No. 82-1616

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

WEBER AIRCRAFT CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Neither respondents nor amici have successfully refuted our contention that Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), "incorporates the privileges which the Government enjoys * * * in the pretrial discovery context." *FTC* v. *Grolier, Inc.*, No. 82-372 (June 6, 1983), slip op. 7-8 (quoting *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975)). Nor can they get around the court of appeals' statement that it was willing to assume that the materials at issue here would be privileged in civil discovery. Finally, they concede that Congress was aware of the

Machin privilege when it enacted the FOIA, and they do not explain what sense it would have made for Congress to mandate release under the FOIA when the same documents would be privileged in civil litigation.

I

A. As we explained in our opening brief (Gov't Br. 14-24), the statements at issue in this case are protected by the plain language of the FOIA. They fall squarely within the terms of Exemption 5, which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" (5 U.S.C. 552(b)(5)). The court of appeals correctly held (Pet. App. 4a n.5) that the statements are "intra-agency memorandums or letters"; and the court properly assumed (*id.* at 8a) that the statements "would not be available by law" to a private party in civil discovery. In addition, since the privilege recognized in *Machin* v. *Zuckert*, 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963), does not "substantially duplicate any other FOIA exemption" (*FOMC* v. *Merrill*, 443 U.S. 340, 360 (1979)), the text of the FOIA provides no reason to believe that Congress intended to modify the scope of the civil discovery privilege.

B. Neither respondents nor amici have pointed to anything in the statutory language that supports their contention that the statements are not protected by Exemption 5. Respondent Mills (Br. 4-5, 14-15) argues that the language of Exemption 5 is unclear in ways unrelated to the question presented by this case. Mills relies on the observation in *EPA* v. *Mink*, 410 U.S. 73, 86 (1973) (footnote omitted), that Exemption 5 does not specify "whether the Government is to be treated as though it were a prosecutor, a civil plaintiff, or a defendant" and that "the Act, by its

terms, [does not] permit inquiry into the particularized needs of the individual seeking the information, although such an inquiry would ordinarily be made of a private litigant." These problems, however, have nothing to do with the present case, and in any event the Court has largely resolved them by concluding that Exemption 5 protects "those documents, *normally* privileged in the civil discovery context." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (emphasis added; footnote omitted). See *FTC* v. *Grolier, Inc.*, slip op. 7.

Mills maintains (Br. 24) that "whenever Congress intended to include a privilege for confidential statements, it did so by express language," as in Exemptions 4 and 7. This argument overlooks the fact that Exemption 5 has been held to incorporate the attorney-client privilege (see *FOMC* v. *Merrill*, 443 U.S. at 355 n.15), which protects confidential communications between an attorney and client.

Mills also erroneously contends (Br. 8, 25-26) that the 1976 amendment of Exemption 3 shows that Exemption 5 was not intended to protect statements such as those at issue here. Not only did that amendment concern a different FOIA exemption, but Congress's purpose was completely consistent with our interpretation of Exemption 5. Before 1976, Exemption 3 allowed nondisclosure of any materials "specifically exempted from disclosure by statute." Pub. L. No. 89-487, § 3(e)(3), 80 Stat. 251. In *FAA Administrator* v. *Robertson*, 422 U.S. 255 (1975), the Court held that this exemption protected materials that an agency was given discretion to withhold by statute under a broad public interest standard. Congress then amended Exemption 3 to apply only where the statute authorizing nondisclosure leaves the agency no discretion or establishes clear criteria for withholding (5 U.S.C. 552(b)(3)). The purpose of the 1976

amendment was to prevent agencies from withholding information under a vague public interest standard. Under our interpretation of Exemption 5, agencies would not have anything resembling such authority. Instead, Exemption 5 would merely protect those materials covered by established civil discovery privileges.[1]

Amicus Reporters Committee contends (Br. 36-45) that our interpretation of Exemption 5 would permit nondisclosure of information that Congress did not intend to exempt. Three principal cases are cited to support this argument, but none is germane. The first,[2] unlike the present case, concerned a privilege embodied in another FOIA exemption. The second[3] involved materials that might have been privileged in civil discovery but did not constitute "inter-agency or

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[1] Mills' argument (Br. 15-17) based upon the adoption of Fed. R. Evid. 501 is difficult to understand. As we argued in our opening brief (at 23-24), congressional disagreement regarding the privileges available under federal law supports the view that Exemption 5 was intended to incorporate "the privileges which the Government enjoys under the relevant statutory and *case law* in the pretrial discovery context" (*Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975) (emphasis added)), rather than a limited list of privileges.

Mills argues (Br. 29) that if Exemption 5 incorporates the *Machin* privilege it must also protect statements given in confidence to agencies responsible for investigating and preventing other types of accidents. However, Exemption 5 protects only those materials covered by recognized civil discovery privileges, not any safety information furnished in confidence to a federal agency. See also page 16 note 17, *infra*.

[2] *Halkin* v. *Helms*, 598 F.2d 1 (D.C. Cir. 1978).

[3] *County of Madison* v. *Department of Justice*, 641 F.2d 1036 (1st Cir. 1981).

intra-agency memorandums or letters" within the meaning of Exemption 5. There is no such problem here. In the third case,[4] amicus contends, the courts refused to require discovery of unprivileged materials because they were included in files that contained privileged materials. However, we are not contending that Exemption 5 permits nondisclosure of unprivileged materials, and both the court of appeals (Pet. App. 8a) and respondents have assumed that the documents at issue here are privileged.

II

Respondents and amici contend that the legislative history of the FOIA is insufficient to prove that Congress intended Exemption 5 to protect the statements at issue here. This argument is based upon a misunderstanding of the role of legislative history in statutory interpretation, as well as an incorrect evaluation of the relevant legislative history.

A. Legislative history is an aid in interpreting the language of a statute. If the statutory language is clear, it is not necessary to look further. See, *e.g.*, *Dickerson* v. *New Banner Institute, Inc.*, No. 81-1180 (Feb. 23, 1983), slip op. 7. If there is some ambiguity in the language of the statute, the legislative history may be consulted to see if there is any reason for concluding that Congress did not mean what its words appear to say. In general, the importance of the legislative history is inversely proportional to the clarity of the statutory language.

The language of Exemption 5 is unambiguous. The exemption protects "those documents * * * normally privileged in the civil discovery context" (*NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. at 149 (footnote omit-

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[4] *Swanner* v. *United States*, 406 F.2d 716 (5th Cir. 1969).

ted)) and, as the court of appeals correctly assumed, "the witness statements here would be shielded from civil discovery under the *Machin* privilege" (Pet. App. 8a). Thus, the statutory language should control unless the legislative history yields clear proof of a contrary congressional intent.

B. Respondents and amici, on the other hand, take the opposite approach, arguing that the apparent meaning of the statutory language should be violated unless the legislative history clearly indicates that Congress really meant what it seems plainly to have said. Under customary rules of statutory construction, however, the correct result in this case is apparent, for there is nothing in the legislative history showing that Congress intended to require disclosure of confidential statements made to military safety accident investigators; indeed, as we noted in our opening brief (at 25-30), there is much evidence that Congress intended to protect such statements.

Contrary to the suggestion of respondents and amici, the supporting legislative history is as strong as it was in *Merrill*, where the Court held that Exemption 5 protects certain monetary policy directives issued by the Federal Reserve Board. In *Merrill*, the Court began (443 U.S. at 356-357) by inquiring whether these directives would be privileged in civil litigation and thus whether they fell within Exemption 5's plain terms. The Court found authority for a qualified evidentiary privilege for certain "confidential commercial information" (*id.* at 356) but no authority specifically relating to the monetary policy directives. In the present case, by contrast, the privileged status of the very type of statements at issue is well established.[5]

[5] This contrast is highlighted by the fact that in *Merrill* the government relied on the *Machin* privilege to show that the

The Court next drew support (443 U.S. at 357-358) from statements made by witnesses at the hearings on the FOIA regarding the need to protect a loose category of "confidential commercial information" such as "information relating to the purchase or sale of real estate, materials, or other property." [6] One statement relating to Federal Reserve open market operations was found. *Id.* at 358 & n.21. As our opening brief (at 26-29) showed, there is at least equal support in these same hearings for the *Machin* privilege.

Finally, the *Merrill* Court noted (443 U.S. at 359) the statement in the House report (H.R. Rep. 1497, 89th Cong., 2d Sess. 10 (1966)), that "a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contact." The Court analogized this information to the Federal Reserve's monetary policy directives (443 U.S. at 359, 360). While we agree fully with this reasoning, it bears emphasis that the Court in *Merrill* relied upon a rough analogy and that the monetary policy directives do not concern the awarding of contracts.

In this case, we think it is reasonable to infer from the following facts that Exemption 5 was specifically intended to shield statements like those at issue here: such statements would not have been protected by the

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monetary policy directives were privileged because they constituted " 'official government information' whose disclosure would be harmful to the public interest" (*FOMC* v. *Merrill*, 443 U.S. at 355 n.17).

[6] 443 U.S. at 358 (citing *Administrative Procedure Act: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 418 (1965) (hereinafter cited as *1965 Senate Hearings*)).

version of Exemption 5 referred to the Senate committee but fall within the plain meaning of Exemption 5 as amended by the committee and ultimately enacted; the Senate committee stated that its amendment was made in response to suggestions voiced at the committee hearings; a number of government witnesses at those hearings referred specifically to the very type of statements involved here, noted that such statements were apparently not shielded from compulsory disclosure under the bill then under consideration, and argued that disclosure of such statements should not be required; and no witness or member of Congress suggested during the hearings that mandatory disclosure of such statements was desirable. See Gov't Br. 25-30.

C. Relying on discussion in *EPA* v. *Mink*, 410 U.S. at 87-91, respondent Weber (Br. 8-10) and several amici (Forgecraft Am. Br. 13; Badhwar Am. Br. 15) argue that Congress could not have meant to protect witness statements under Exemption 5 because that provision does not apply to purely factual materials. But as noted in our opening brief (at 34), the discussion in *Mink* was limited to the deliberative process privilege, which does not extend to factual material. Exemption 5 itself, however, is not so limited but protects purely factual material covered by other privileges, such as the attorney-client and work-product privileges.

D. Respondent Mills (Br. 21-22) maintains that the Senate committee's sole reason for amending Exemption 5 was to protect documents in which facts are interspersed with matters of law and policy. However, this theory does not adequately explain the language of the amendment, which substituted the phrase "inter-agency or intra-agency memorandums or letters which would not be available by law to a private party

in litigation with the agency" for the phrase "intra-agency or inter-agency memorandums or letters dealing solely with matters of law or policy." This amendment obviously did more than protect those documents in which "matters of law or policy" were mixed with factual information. Instead, the amendment changed Exemption 5 from a narrow provision limited in large part to materials covered by the deliberative process privilege to a much broader provision applicable to other privileged materials, including purely factual material such as work product.

E. Respondents note (Weber Br. 12-17; Mills Br. 20 n.12) that some of the references to the *Machin* privilege during the congressional hearings were made while discussing Exemption 7.[7] But that fact lends little support to their argument. When the statements in questions were made, Exemption 5 was restricted to documents "dealing solely with matters of law or policy" and thus bore little relationship to statements made in confidence to military safety investigators. Exemption 7, which protected "investigatory records compiled for law enforcement purposes," was more closely related, and therefore some of the witnesses referred to that exemption in the course of recommending that such statements be protected. When Congress amended Exemption 5 to protect materials normally privileged in civil discovery, it accommodated the witnesses' concerns. It is hardly unusual for Congress to adopt a practical recommendation by draftsmanship of its own design. It is also noteworthy that this Court in *Merrill* relied upon statements addressed to Exemption 7 even though that

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[7] But see *1965 Senate Hearings* 196 (statement of Assistant Attorney General Schlei). See Gov't Br. 27.

case dealt solely with Exemption 5. See 443 U.S. at 358.[8]

F. Respondents (Weber Br. 18; Mills Br. 32-35) and amicus Reporters Committee (Br. 35 n.4) argue that Congress's failure in recent years to adopt proposed legislation codifying the *Machin* privilege shows that Congress did not intend to incorporate the privilege into Exemption 5 when the FOIA was enacted. It is settled, however, that adverse inferences should not be drawn from an agency's request for clarifying legislation. See, *e.g.*, *Black* v. *Magnolia Liquor Co.*, 355 U.S. 24, 27 (1957); *United States* v. *Turley*, 352 U.S. 407, 415 n.14 (1957); *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47-48 (1950). Furthermore, it seems clear that Congress's failure to enact the requested legislation is not evidence of disagreement with our interpretation of Exemption 5 or with the *Machin* privilege.[9]

In the Ninety-Sixth Congress, well before this case was argued or decided in the court of appeals, the armed forces attempted to eliminate any lingering uncertainty by seeking enactment of a statute protecting several portions of safety reports, including "statements or information obtained under an express

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[8] Indeed, the Defense Department references to the *Machin* privilege quoted in our opening brief (at 26-27) appear in the same portion of one of the statements upon which *Merrill* relied (443 U.S. at 358). See *1965 Senate Hearings* 418.

[9] In any event, " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Jefferson County Pharmaceutical Association* v. *Abbott Laboratories*, No. 81-827 (Feb. 23, 1983), slip op. 15 n.27 (quoting *United States* v. *Price*, 361 U.S. 304, 313 (1960)).

promise of confidentiality from a witness or manufacturer." H.R. 7552, 96th Cong., 2d Sess. (1980). On October 1, 1980, the House Committee on Armed Services reported favorably on the bill (H.R. Rep. 96-1445, 96th Cong., 2d Sess. 2-3 (1980)), noted that it applied to materials now protected by a non-statutory privilege (*id.* at 2-3), and observed presciently (*id.* at 4) that "in an increasingly litigious society, * * * the status of aircraft accident safety reports should not be supported by such a slender reed." [10] The bill, however, was not passed during the short time before the Ninety-Sixth Congress's term expired.

In 1983 a similar measure (which is broader than the privilege at issue in this case)[11] was passed by the Senate. S. 675, 98th Cong., 1st Sess. § 1009 (1983). See Senate Comm. on Armed Services, *Omnibus Defense Authorization Act of 1984*, S. Rep. 98-174, 98th Cong., 1st Sess. 249-250 (1983). The House bill did not contain such a provision, and the conferees deferred passage pending the submission of further information by the Department of Defense. S. Conf.

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[10] The report stated (H.R. Rep. 96-1445, *supra*, at 3) that "there is no existing statutory protection of any kind for military aircraft accident safety reports." This meant that the *Machin* and deliberative process privileges, upon which the military now relies, are not codified. It did not mean that Exemption 5 does not incorporate those privileges (compare Mills Br. 33-34). Exemption 5 is not an independent source of protection but instead incorporates civil discovery privileges, including those recognized in case law. See note 1, *supra*.

[11] The bill also protects the investigators' deliberations, discussions, analysis, opinions, conclusions, findings, and recommendations, as well as the life science reports, which generally reflect the opinions of medical and psychological experts. See S. Conf. Rep. 98-213, 98th Cong., 1st Sess. 264 (1983).

Rep. 98-213, 98th Cong., 1st Sess. 264 (1983). Obviously, these events do not support respondents' or amici's argument.[12]

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[12] Respondent Weber (Br. 25) contends that the statements at issue must be disclosed on the ground that the government failed to show that promises of confidentiality were made. However, both courts below concluded otherwise. See Pet. App. 4a ("issue is whether Exemption 5 permits [nondisclosure of] statements of military personnel given under a promise of confidentiality * * *"); *id.* at 23a-24a. An uncontroverted affidavit filed in district court established that the statements were obtained under a pledge of confidentiality in the course of an authorized Air Force safety investigation. R.E. 42, Affidavit of Maj. Gen. Len C. Russell, Commander Air Force Inspection and Safety Center 2. Contrary to Weber's assertion (Br. 6-7) the then-applicable Air Force regulation (A.F. Reg. 127-4 (Jan. 1, 1973) (Pet. App. 31a-32a)) clearly provided that such statements were privileged and confidential and were to be used "solely within the [Air Force] * * * to prevent accidents." And since at least 1963, the courts have recognized that it is the policy of the military services to make such promises of confidentiality. See *Machin* v. *Zuckert*, 316 F.2d at 339.

Weber also maintains (Br. 32) that any protection offered by Exemption 5 was waived because an Air Force employee inadvertently allowed Hoover's counsel to see portions of the documents during a deposition. This claim was not raised in or decided by the court of appeals and thus need not be addressed by this Court. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. at 163-164; *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, "[a]n unauthorized disclosure of documents does not * * * constitute a waiver of the applicable FOIA exception." *Medina-Hincapie* v. *Department of State*, 700 F.2d 737, 742 n.20 (D.C. Cir. 1983); see also *Murphy* v. *FBI*, 490 F. Supp. 1138, 1142 (D.D.C. 1980); *Safeway Stores, Inc.* v. *FTC*, 428 F. Supp. 346, 347 (D.D.C. 1977). *Cooper* v. *Department of the Navy*, 594 F.2d 484 (5th Cir.), cert. denied, 444 U.S. 926 (1979) (see Weber Br. 32-33), which did not concern witness statements, held that a waiver occurred where a document was "furnished to one side of a

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A. Like the court of appeals (see Pet. App. 8a), respondents have not questioned the fact that statements such as those involved in the present case fall within the civil discovery privilege recognized in *Machin*. Amici, however, maintain that the *Machin* privilege is limited to statements made by nonmilitary witnesses. Badhwar Am. Br. 35-41; Forgecraft Am. Br. 5-8; Reporters Committee Am. Br. 13-14.[13] Their argument is based upon a misreading of the *Machin* opinion.

In *Machin*, the sole survivor of an Air Force plane crash brought suit against the manufacturer of the plane's propeller assemblies and subpoenaed the Air Force safety report, which included both confidential witness statements and the report of the mechanics who had examined the records (316 F.2d at 337-338). Holding that the confidential witness statements were privileged, the District of Columbia Circuit stated (*id.* at 339):

> We agree with the Government that when disclosure of investigative reports obtained in large part through promises of confidentiality would hamper the efficient operation of an important Government program and perhaps even, as the Secretary here claims, impair the national secu-

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lawsuit and not to the other" (594 F.2d at 488). Here, according to Weber (Br. 32), all parties to the underlying suit have seen the document but none has a copy.

[13] By contrast, respondent Weber maintains (Br. 8) that the confidential statements of private parties cannot be withheld under Exemption 5 because they are not "inter-agency or intra-agency" documents. We disagree with this argument, which would appear to necessitate disclosure of some attorney-client and work-product materials that Congress intended to protect. In any event, this question need not be addressed in the present case, which concerns statements by Air Force personnel.

> rity by weakening a branch of the military, the reports should be considered privileged.

By contrast, the court held that these considerations did not justify withholding the mechanics' report because "[t]heir investigations and reports would not be inhibited by knowledge that their conclusions might be made available for use in future litigation" (316 F.2d at 340). The court instructed the district judge to review the reports in camera to determine whether the deliberative process privilege applied (*id.* at 340-341).

Amici base their argument upon the statement in *Machin* that the subpoena had been properly quashed "[i]nsofar * * * as [it] sought to obtain testimony of *private parties* who participated in the investigation" (316 F.2d at 339 (emphasis added)). They also rely upon a sentence in the Air Force affidavit stating that promises of confidentiality were needed to obtain frank disclosures from aircraft manufacturers' representatives (*ibid.*). These incidental references, however, fail to show that the *Machin* privilege was limited to statements made by private parties. The court's reason for accepting the privilege fully applies to statements by military as well as civilian witnesses. The court appears to have used the term "private parties" merely to describe the individuals who had furnished confidential statements and to distinguish them from the mechanics who had examined the wreckage.

In any event, the weight of authority draws no distinction between the statements of military and nonmilitary witnesses. See *Cooper* v. *Department of Navy*, 558 F.2d 274, 277-278 (1977), modified on other grounds, 594 F.2d 484 (5th Cir.), cert. denied, 444 U.S. 926 (1979); *Brockway* v. *Department of the Air Force*, 518 F.2d 1184 (8th Cir. 1975); *Theri-*

ault v. *United States*, 395 F. Supp. 637 (C.D. Cal. 1975); *Rabbitt* v. *Department of the Air Force*, 401 F. Supp. 1206 (S.D.N.Y. 1974); 2 D. Louisell & C. Mueller, *Federal Evidence* § 230, at 755 & n.25 (1978); *McCormick on Evidence* § 107, at 230 n.6 (E. Cleary 2d ed. 1972); J. Weinstein & M. Berger, *Evidence* ¶ 509[07], at 509-47 n.6 (1982); *id.* ¶ 510[03], at 510-23 & n.13; C. Wright & A. Miller, *Federal Practice and Procedure* § 2019, at 169 n.22 (1970).[14] The references to the *Machin* privilege in the legislative history of the FOIA draw no distinction between military and other witnesses (see Gov't Br. 26-29). Likewise, Air Force regulations have never drawn such a distinction. Nor is there any sound reason for adopting such a restriction. Indeed, it is arguable that the privilege is more essential in the case of military personnel because they are often the only ones able to provide information about human errors that cannot be detected from examination of the tangible evidence.

Amicus Forgecraft argues (Br. 7) that a distinction between military and other witnesses is sensible because military personnel, unlike civilians, may be ordered to provide statements to safety investigators. However, the authority to compel statements hardly ensures the frank disclosures that the *Machin* privilege is designed to promote. Forgecraft also contends (Br. 8) that while the *Machin* privilege may induce candid admissions by private parties, whose employers and supervisors will never learn of their statements, it is unlikely to have a similar effect upon military witnesses, who know that their superiors

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[14] The only contrary holding is *McFadden* v. *Avco*, 278 F. Supp. 57, 59-60 (M.D. Ala. 1967); see also *O'Keefe* v. *Boeing Co.*, 38 F.R.D. 329, 334 (S.D.N.Y. 1965) (dictum; privilege held waived).

will review their statements for purposes of safety. This argument fails because, among other things, it ignores the rules strictly prohibiting the military from using such statements against the witness. See A.F. Reg. 127-4, ¶ 2-5.b (Jan. 18, 1980) (Gov't Br. App. 2a).[15]

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[15] Taking almost precisely the opposite tack, amicus Reporters Committee suggests (Br. 21-22) that, because of these protective rules, the privilege is not needed to induce frank admissions by military witnesses. This argument ignores the role played by the privilege in seeing that the spirit of the rules is honored. By preventing public release of the statements, the privilege helps to ensure that they are examined only by those persons within the military responsible for flight safety. It consequently reduces the chances of a witness's admissions being held against him. Perhaps more important, the privilege encourages candor by military witnesses for whom admissions might cause other types of harm, such as prejudice in civil litigation, damage to reputation, and impairment of post-military employment prospects.

Amici Badhwar and Goldberg argue (Br. 55-56) that the Air Force's "promise of confidentiality is no promise at all" due to Air Force regulations allowing very limited disclosure of confidential witness statements under certain special circumstances. This argument is far-fetched. Under A.F. Reg. 127-4, ¶ 2-5.d(3) (Jan. 18, 1980) (Gov't Br. App. 3a), a person accused in a trial by court-martial may examine the statements of any witness who testifies against him. Such disclosure is required by the Jencks Act, 18 U.S.C. 3500. However, to minimize the effect of disclosure, it is the practice of the Air Force to request that the courtroom be closed when the witness testifies and to resist adverse rulings on this issue. Under A.F. Reg. 127-4, ¶ 5-4.b (Jan. 18, 1980), when a person is found by a safety board to have been a cause of a mishap, he is permitted to review the board's report, including witness statements, for purposes of rebuttal. However, this review takes place in a closed room, the report may not be removed or reproduced in whole or part, and the individual is admonished not to disclose its contents. See A.F. Reg. 127-4, Attachment 4 (Jan. 18,

B. A dominant theme in respondents' and amici's briefs is that the *Machin* privilege is neither effective nor necessary. But that contention is both irrelevant to respondents' FOIA request (see Gov't Br. 34-35) and dramatically refuted by the persistent efforts of many persons, including respondents and amici, to obtain release of statements furnished in confidence to military safety investigators. The parallel investigations conducted by the Air Force and other services demonstrate the usefulness of the *Machin* privilege with almost scientific precision. The unprivileged statements furnished to the accident or collateral investigation serve as a control group; they are very close approximations of the statements that witnesses would provide to the safety investigators if confidentiality could not be assured. Statements made in the collateral investigation are available to the public, but respondents, amici, and others nevertheless seek access to the statements made to the safety investigators. The only explanation for these efforts is a belief that the privileged statements contain valuable information not found in the unprivileged statements. This is strong testimony to the value of the privilege and proof that respondents and amici do not really accept their own arguments.[16]

1980). Carefully restricted disclosure under these circumstances does not undermine the value of the *Machin* privilege. Amici are incorrect in suggesting (Badhwar Am. Br. 55) that A.F. Reg. 127-4, ¶ 2.5.d(1) (Jan. 18, 1980) (Gov't Br. App. 3a) requires release of witness statements under the FOIA. That provision expressly refers only to Part I (*i.e.*, the factual portion) of the safety report and not to witness statements. See A.F. Reg. 127-4, ¶ 2.5.d (Jan. 18, 1980) (Part I disclosable under the FOIA); *id.* at ¶ 5.1.a (describing two-part report); *id.* at ¶ 5.2.b(2) (witness statements in Part II).

[16] Mills suggests (Br. 10, 29) that the *Machin* privilege is not needed because there is no comparable privilege for state-

In an effort to show that the privilege is not needed, respondents (Weber Br. 23-24; Mills Br. 10, 29) and amici Badhwar and Goldberg (Br. 46-52) point to the practices of the National Transportation Safety Board, which investigates civilian aircraft accidents and does not receive confidential witness statements. Amici argue (Badhwar Am. Br. 9) that the NTSB "has responsibilities, for civil aviation, that are identical to military air crash safety investigation boards" and that the NTSB's "record of assuring air safety is far better than that of the military safety boards." This argument overlooks enormous differences between civil and military aviation, as well as between the responsibilities and authority of the NTSB and the military services. Amici's assertion that the NTSB's safety record is better than the military's because the accident rate for civil aviation is lower apparently rests upon the view that piloting a heavily armed

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ments given in confidence to investigators responsible for safety in other fields. Mills overlooks the fact that for much the same reasons that prompted judicial recognition of the *Machin* privilege, Congress has enacted numerous statutes limiting the disclosure or use of such information. See, *e.g.*, 15 U.S.C. 1271 (information obtained by Consumer Product Safety Commission under Federal Hazardous Substances Act inadmissible in criminal prosecution of person from whom obtained); 21 U.S.C. 373 (information obtained under Federal Food, Drug, and Cosmetic Act inadmissible in criminal prosecution of person from whom obtained); 42 U.S.C. 2240 (licensee's nuclear accident report inadmissible in damages action); 46 U.S.C. 234 (Coast Guard official forbidden to divulge identity of licensed merchant marine officers providing information regarding vessel defects); 49 U.S.C. 320(f) (motor carrier's report to ICC regarding accident, as well as ICC report, inadmissible in damages action). See also 33 U.S.C. 930(c) (accident report on death or injury of longshoreman inadmissible); 45 U.S.C. 33, 41 (railroad accident report); 49 U.S.C. 1441(e) (NTSB report).

state-of-the-art supersonic fighter under simulated combat conditions is not inherently more dangerous than flying a scheduled commercial airliner from New York to Chicago. By amici's reasoning, grand prix race car drivers must be less skillful than the average motorist because their accident rate is much higher. The plain fact, of course, is that military aviation must often confront safety problems far different and more severe than those faced by civil aviation. This fully justifies the military's use of different and additional safety measures. Furthermore, the military has a greater need for fast corrective action when safety problems develop [17] and is in a far better position than civil aviation authorities to implement safety changes without breaching confidentiality.[18]

C. Finally, respondents and amici contend that the *Machin* privilege is not worth the cost because it prevents disclosure of information that would be useful in many ways. Their argument completely misses the point because the only effect of the privilege is to

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[17] In civil aviation, when a problem of unknown origin occurs, time-consuming and laborious precautions can be taken until the cause is discovered. If necessary, all planes of the type involved can be removed from service. At worst, such measures cause inconvenience to the flying public. The military, by contrast, often cannot afford these luxuries. Grounding certain types of aircraft while a leisurely safety investigation is conducted may impair the national defense, and under some circumstances removing even a single plane from service must be avoided if possible.

[18] In the typical military accident, the flight crew, ground crew, and air traffic controllers are military personnel; the aircraft is owned and maintained by the military and built to its specifications; and if the mishap occurs at an airport, the airport is likely to be owned and operated by the military as well. Accordingly, the military can often unilaterally correct problems disclosed by its safety investigations. The NTSB, on

prevent public disclosure of information that witnesses would never have revealed unless confidentiality had been assured. In the long run, therefore, abolition of the privilege (and that is the effect of the decision below) would not increase the information available to litigants, the press, or anyone else. Its only effect would be to decrease the information available to those responsible for military aviation safety.

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

JANUARY 1984

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the other hand, investigates accidents involving persons it does not employ and equipment and facilities it does not own or operate. Its findings and recommendations can be implemented only with the knowledge and participation of others. This makes it much more difficult to implement safety changes without breaching confidentiality and thereby reduces the utility of confidential disclosures. See also Gov't Br. 36 n.29.

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